IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1795

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,

Respondents.

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D., TO AND INCLUDING FIFTIETH DOE, M.D.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 18, 1976

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner KURT R. STRAUBE respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on March 18, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is not reported. The opinion of the District Court (App. B) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1976. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a private nonprofit hospital's receipt of public support in the form of tax exemptions, subsidies, including federal Hill-Burton Act funds, charitable contributions for the general public, and

participation in a municipal urban renewal plan in the form of a cooperation agreement, constitute "state action" for the purposes of 42 U.S.C. 1983.

STATUTE INVOLVED

42 U.S.C. Section 1983 provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceedings for redress."

STATEMENT OF THE CASE

Petitioner is a duly licensed physician and was a member of the staff of Emanuel Hospital. On or about January 30, 1973, he was summarily suspended from the medical staff without being advised prior to the suspension that it was being considered and without being allowed any opportunity to refute or inquire into the basis of the

suspension before it occurred. Emanuel Hospital held subsequent hearings, and on or about January 24, 1974, the summary suspension was made permanent.

Petitioner then filed two actions in the United States District Court for the District of Oregon claiming violations of 42 U.S.C.A. §1983 and §1985(3). In each case, petitioner alleged that Emanuel Hospital was a nonprofit corporation existing for charitable purposes under Chapter 61 of the Oregon Revised Statutes, had received public support in the form of tax exemptions, subsidies, including federal Hill-Burton funds, charitable contributions from the general public, and had cooperated with the City of Portland and had entered into an agreement with it with respect to urban renewal.

Respondents moved to dismiss the complaints asserting as a ground, inter alia, that there was no color of state law. Respondents' motions to dismiss were granted,

and the cases were dismissed on the merits. Upon appeal, the United States Court of Appeals for the Ninth Circuit affirmed the lower court decision dismissing the claims for lack of state action.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals conflicts with the decisions of other Courts of Appeal which have decided the same matter.

The United States Court of Appeals for the Fourth Circuit has consistently held that receipt of federal Hill-Burton Act funds sufficiently involves the federal and states governments in the affairs of an otherwise private institution to subject, i.e., a hospital, to the restrictions which the Fourteenth Amendment places upon state action. Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974); Christhilf v. Annapolis Emergency Hospital Ass'n, Inc., 496 F.2d 174 (4th Cir.

1974); Sams v. Ohio Valley General Hospital Ass'n, 413 F.2d 826 (4th Cir. 1969); Simpkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963); cert. denied, 376 U.S. 938 (1964). Similarly, in Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964), the Court held that where a hospital was constructed with private funds on city and county property, was accorded the power of eminent domain, was the recipient of city and county funds for expansion, was granted tax exemptions, and was subject to detailed state regulation, it was subject to the proscriptions of the Fourteenth Amendment.

The United States Court of Appeals for the Sixth Circuit, in O'Neil v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973), held that receipt of federal Hill-Burton Act funds, the existence of a lease for nominal consideration between the hospital and the county, and the fact that the hospital's board of directors had to

obtain at least one member from each of the county's magisterial district, indicated that the hospital was not a purely private institution immune from the mandates of the Fourteenth Amendment. The Court also held in Chiaffetelli v. Dettmer Hospital, Inc., 437 F.2d 429 (6th Cir. 1971), that where a hospital received budget support from the county and from federal Hill-Burton Act funds and a majority of its Board of Governors were responsible to the public, it was a public institution actionable as such under 42 U.S.C. §1983. Similarly, in Meredith v. Allen County War Memorial Hospital Comm'n, 397 F.2d 33 (6th Cir. 1968), the Court held that where an institution serves an important public function and is financed by federal Hill-Burton Act funds, it is sufficiently linked with the state for its actions to be subject to the limitations of the Fourteenth Amendment. However, in Jackson v. Norton Children's Hospitals, Inc., 487 F.2d 502 (6th

Cir. 1973), the Court held that receipt of partial federal funding, without anything more, would not support jurisdiction under 42 U.S.C. §1983.

The United States Court of Appeals for the Eight Circuit and the Tenth Circuit, in Klinge v. Lutheran Charities Ass'n, 523 F.2d 56 (8th Cir. 1975), and Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir. 1971), did not question and appeared to acknowledge that where a defendant nonprofit private hospital had participated substantially in the receipt of federal funds and had substantial contract relations with the state and city governments, it was subject to federal constitutional limitations. However, later, in Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973), the Court held that receipt of federal Hill-Burton funds equal to 5 percent of the total construction cost of certain improvements was insufficient to

invoke jurisdiction under 42 U.S.C. §1983.

On the other hand, the United States Court of Appeals for the Second Circuit, the Fifth Circuit and the Ninth Circuit have held that the receipt of the public funds, certain tax advantages, and other relationships with the state were not sufficiently connected with the actions of a private nonprofit hospital to constitute state action under 42 U.S.C. §1983. Barrett v. United Hospital, 506 F.2d 1395 (2nd Cir. 1975), Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973), and Ascherman v. Presbyterian Hospital, 507 F.2d 1103 (9th Cir. 1974).

As such, there is a clear conflict between the decisions of the United States Court of Appeals for the Fourth Circuit and the decisions of the United States Courts of Appeals for the Second, Fifth and Ninth Circuits with respect to this question. Indeed, there appears to be a conflict in the

decisions within each of the United States Courts of Appeals for the Sixth, Eighth and Tenth Circuits with respect to this question. As such, this Court should grant this Petition for Certiorari.

Petitioner is aware of the decision of this Court denying a petition for certiorari in Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), cert. denied, 44 U.S.L.W. 3328 (December 2, 1975), but believes that the question of law presented herein is of sufficient importance that it is a proper subject for an authoritative decision by this Court. Indeed, the trial court in Barrett v. United Hospital, 376 F.Supp. 791 (S.D.N.Y. 1974), aff'd, supra, in holding that the receipt of federal assistance by a private nonprofit hospital did not constitute a state action, specifically stated that it was following the dictates of decisions of the Second Circuit, and stated that had the matter arisen in any of several other circuits

the decision may have been contrary. Moreover, Justice White, in dissenting from the denial of the petition for a writ of certiorari in Greco v. Orange Memorial Hospital Corp., supra, stated:

> "Whether or not the Court agrees with the result reached below, the conflicts are square; they are on issues which arise with frequency in the lower federal courts; and they are on significant questions of law. Perhaps, in light of the current pressures on our docket, there may be a category of conflicts, involving insignificant points of federal law, which we simply do not have the capacity to resolve. However, it would undoubtedly surprise members of the bar and the public that this Court views the conflicts created by the decision below to fall within such a category." Greco v. Orange Memorial Hospital Corp., supra, 3329.

The question of what conduct by a private nonprofit hospital amounts to state action has wide ranging implications. It dictates responsibilities of such a hospital to its physicians as well as to its patients, and should finally be resolved by this Court.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES PAULSON
Attorney at Law, P.C.

By_____
Charles Paulson
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KURT R. STRAUBE, M.D., *Appellant*,

vs.

ROGER G. LARSON, et al., *Appellees*.

No. 74-3496
No. 74-3497

MEMORANDUM

[March 18, 1976]

Appeal from the United States District Court
for the District of Oregon

Before: ELY and TRASK, Circuit Judges, and
CHRISTENSEN, District Judge.*

Straube, a radiologist, was suspended from the staff of Emanuel Hospital, allegedly without a hearing or justification. The District Court dismissed his civil rights claims, brought under 42 U.S.C. § 1983, for lack of "state action". We affirm.

Emanuel Hospital is a private charitable institution receiving public funds and certain tax advantages. These facts alone are insufficient to establish the required state action. *See Taylor v. St. Vincent's Hospital*, 523 F.2d 75 (9th Cir. 1975); *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975).

Straube contends that the hospital's connection with an urban renewal project of the City of Portland establishes the necessary state nexus. We disagree. The key to a determination of state action is that the state must be significantly involved in the specific activity of which complaint is made. *Watkins, supra;*

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*Honorable A. Sherman Christensen, Senior United States District Judge, Salt Lake City, Utah, sitting by designation.

Ascherman v. Presbyterian Hosp. of Pac. Med. Co., Inc., 507 F.2d 1103 (9th Cir. 1974); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974). Here there is no such allegation. That the hospital and the City are parties to an urban renewal project is an example of a state contact, but nothing indicates that Portland is involved in the hospital's decisions in respect to the hospital's personnel.

AFFIRMED.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D.,	)	
	)	
Plaintiff,	)	NO. 74-307
	)	
v.	)	OPINION
	)	
ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,	)	
	)	
Defendants.	)	

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D.,	)	
	)	
Plaintiff,	)	No. 74-308
	)	
v.	)	OPINION
	)	
ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D. TO AND INCLUDING FIFTIETH DOE, M.D.,	)	
	)	
Defendants.	)	

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Attorneys for John C. English

SKOPIL, Judge:

Plaintiff, Kurt R. Straube, M.D., asserts that he was deprived of his Fourteenth Amendment rights by defendants, Emanuel Lutheran Charity Hospital Board and its president, Roger Larson.

Plaintiff, in a second Complaint, alleges that Larson and defendant-doctors, English, Seapy, and Helm, conspired to deprive him of equal protection under the law.

The defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. (Fed. R. Civ. P. 12(b)(1) and (b)(6).

Plaintiff, a radiologist, was a meber of the staff of Emanuel Hospital. On February 22, 1973, Larson, the hospital president, temporarily suspended plaintiff's staff privileges. In January of 1974 Emanuel's executive board permanently suspended plaintiff from the staff. Plaintiff avers that his suspensions were neither preceded by a hearing nor justified. He contends that Larson and defendant-doctors conspired to effect his dismissal and destroy his professional reputation.

This is a civil rights action authorized under 42 U.S.C. §1983 and §1985. Jurisdiction is invoked pursuant to 28 U.S.C. §1343.

Plaintiff's initial hurdle is jurisdiction. He must show state involvement in the hospital's suspension of his staff privileges before federal law will apply. He contends that several factors establish "state action" by the defendants:

(1) Emanuel Hospital is impressed with a public responsibility.

(2) Emanuel receives substantial state and federal benefits, including funds under the Hill-Burton Act, 42 U.S.C. §200 et seq.

(3) Emanuel is permitted to issue tax-exempt bonds.

He also asserts that Emanuel had a co-operation agreement with the City of Portland in Urban Renewal projects.

Emanuel is a private, non-profit hospital organized for charitable purposes. It is "only by sifting facts and weighing circumstances that the non-obvious involvement of the State can be attributed its true significance". Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

There is a split of authority as to whether the above factors clothe private hospitals with the requisite "state action". The cases cited by plaintiff fail to associate the claimed state involvement with the challenged activity. They fail to apply the nexus requirement set out by the Supreme Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the controlling decision in the area of private versus state action.

Moose Lodge involved an action by a guest of a member of a private club who was refused service because of his race. He contended that the grant of a liquor license by the state liquor authority implicated the state in actions by the club. The Court concluded that the regulatory scheme did not foster or encourage the club's racially discriminatory practices.

The Court limited the doctrine of state action by requiring a connection between the injury and the governmental presence.

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject

> "to State regulation in any degree whatsoever. Since State-furnished services include such necessities of life as electricity, water and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the Civil Rights Cases, supra, and adhered to in subsequent decisions." Moose Lodge, 407 U.S. at 173.

Barret v. United States, _____ F. Supp. _____, S.D. N.Y. Docket No. 73 Civ. 1716 (1974), presents a thorough analysis of all the major cases cited by both sides. Barret involved facts similar to those alleged in plaintiff's Complaints. The Court applied the Moose Lodge requirement of a connection between governmental activity and a civil rights injury.

The Court also noted that the cases which subjected private institutions to the limitations of §1983 generally involved either racial discrimination or activities which are traditionally the exclusive province of state or municipal governments. Barret rejected the notion that private hospitals carry on traditional government functions.

As noted in Moose Lodge, the Civil Rights Act is not intended to provide a general federal tort claims remedy. Plaintiff could conceivably find some degree of state involvement in virtually every major private

institution existing today. Plaintiff's Complaints fail to allege the necessary nexus between governmental involvement with Emanuel Hospital and his suspension from staff privileges. Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

Plaintiff's second Complaint alleges a conspiracy in violation of 42 U.S.C. §1985. The Supreme Court in Griffin v. Breckinridge, 403 U.S. 88 (1971), held that before a cause of action exists under §1985 "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions". Griffin at 102. Plaintiff has not alleged any class-based discrimination. His Complaint fails to satisfy the requirements of the statute. Jackson v. Norton Children's Hospital, 487 F.2d 502 (6th Cir. 1973); O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973).

Defendants' motions to dismiss are granted. A final order will be entered dismissing plaintiff's Complaints.

Dated this 7th day of October, 1974.

/s/ Otto R. Skopil, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D., Plaintiff, v. ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital, Defendants.	)	CIVIL 74-307 JUDGMENT

KURT R. STRAUBE, M.D., Plaintiff, v. ROGER G. LARSON, JOHN C. ENGLISH, et al., Defendants.	)	CIVIL 74-308 JUDGMENT

Based upon the Opinion of the Court entered contemporaneously herewith,

IT IS ORDERED and ADJUDGED that defendants' motions to dismiss are granted, that plaintiff shall take nothing, and the cases are dismissed on the merits.

DATED this 8th day of October, 1974.

/s/ Robert M. Christ
ROBERT M. CHRIST, CLERK OF COURT

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July 1, 1976

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Respondents Roger G. Larson, Emanuel Lutheran Charity Board, Robert Seapy, M.D., and Richard K. Helm, M.D., respectfully urge the Court to deny Petitioner's request for a Writ of Certiorari in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported but is attached to the Petition as Exhibit A. The opinion of the District Court is not reported but is attached to the Petition as Exhibit B.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Whether the existence of governmental contacts with a private institution renders conduct of that institution which is unrelated to the governmental contacts state action subject to Constitutional regulation.

STATUTE INVOLVED

42 U.S.C. § 1983 is set forth in the

Petition.

STATEMENT OF THE CASE

Petitioner's statement of the case accurately reflects the allegations of his Complaint upon which the opinions below were based and the procedural history of this litigation.

REASONS FOR DENYING THE WRIT

The question presented in this case was resolved by this Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), which stated that where governmental contacts with a private institution were not so pervasive as to make that institution lose its essentially private character, there must be a nexus between the governmental contacts alleged and the conduct complained of before that conduct can fairly be characterized as state action. Moose Lodge involved an action by a guest of a member of a private club who was refused service because of his race. Plaintiff relied on the liquor licensing provisions of Pennsylvania law. This Court held that the practice of racial

discrimination was not state action, even though the club was subject to extensive government regulation by virtue of its liquor license. "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the state in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S. at 176 - 177.

Numerous attempts have been made to label any action of a purely private hospital state action by virtue of the fact that the hospital receives Federal funds under the Hill-Burton Act and has other incidental governmental contact. The United States Courts of Appeals for the Second, Fifth, Seventh, Ninth and Tenth Circuits have each held that the actions of a private, non-profit hospital do not constitute state action merely by reason of the hospital's receipt of Hill-Burton funds, tax advantages or other incidental governmental

contacts absent some connection between the governmental contacts and the action complained of. Barrett v. United Hospital, 376 F.Supp 791 (S.D.N.Y., 1974), aff'd, 506 F.2d 1395 (2nd Cir., 1975), Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), cert. denied, 44 U.S.L.W. 3328 (December 2, 1975), Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir., 1973), Ascherman v. Presbyterian Hospital, 507 F.2d 1103 (9th Cir., 1974), Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

The Eighth Circuit in Klinge v. Lutheran Charities Association, 523 F.2d 56 (8th Cir., 1975), did not decide this question since the Defendant Hospital conceded Plaintiff's position and the Court never had to address it.

The Sixth Circuit's early decisions did ignore the nexus requirement, but, subsequent to this Court's decision in Moose Lodge, that Circuit reversed its position and held that the receipt of Hill-Burton funds alone did not make

conduct of a private hospital state action. Jackson v. Norton Children's Hospitals, Inc., 487 F.2d 502 (6th Cir., 1973).

Plaintiff, in his Petition, asserts that there is a split within the Tenth Circuit because of the early decision of Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir., 1971). In that case, the hospital did not challenge Plaintiff physician's assertion that its conduct amounted to state action. In Ward v. St. Anthony Hospital, supra, the Court restated its long-standing rule that "the claimed involvement must be associated with the challenged activity" and held that since there existed no nexus between the governmental contacts alleged and the medical staff decisions of St. Anthony Hospital, such decisions were not state action. 476 F.2d at 675.

Thus, only the Fourth Circuit has consistently ruled that receipt of Hill-Burton funds alone transforms the conduct of a private hospital into that of a state agency.

CONCLUSION

A clear majority is emerging among the Circuits applying the nexus requirement outlined by this Court in the Moose Lodge decision with regard to the conduct of private hospitals receiving government funds. The split among the Circuits appears to be resolving itself and there is no compelling need for this Court to consider the question.

Respectfully submitted,

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WOLF & SMITH

By: _____
Robert P. Jones
Of Attorneys for
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Larson, Emanuel Lutheran
Charity Board, Robert
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Richard K. Helm, M.D.

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

QUESTIONS PRESENTED FOR REVIEW

Petitioner's misunderstanding of this case commences with his misapprehension of the question presented to this Court and permeates his entire petition for certiorari.

Petitioner asks whether respondent-Emanuel's receipt of state and federal aid in various alleged forms constitutes state action under 42 U.S.C. § 1983. The actual question presented is whether there is any nexus or connection between Emanuel Hospital's receipt of governmental aid and the dismissal of petitioner from hospital staff privileges at Emanuel Hospital. A reasonable statement of the issue presented is:

> Absent any actual or alleged nexus between a private nonprofit hospital's receipt of public support and the suspension of petitioner from staff privileges at the hospital, did the lower court error in finding insufficient "state action" to support petitioner's claims under 42 U.S.C. § 1983?

STATEMENT OF THE CASE

Petitioner's statement of the case is a fair summation of the procedural history of this litigation. It is noteworthy, however, that petitioner has nowhere alleged in his complaints that any of the various forms of state aid to Emanuel Hospital were conditioned upon or in any way connected with petitioner's dismissal from hospital staff privileges at Emanuel Hospital.

REASONS FOR DENYING THE WRIT

Petitioner has exaggerated any existing conflict between the decisions of the circuit courts on the question presented. Further, this court recently denied a petition for certiorari which presented the precise issue. Greco v. Orange Memorial Hospital Corporation, 513 F.2d 873 (5th Cir. 1975), cert. den., ____ U.S. ____, 96 S. Ct. 433, 46 L. Ed.2d 376 (1975).

Prior to 1972, the circuit courts rendered numerous decisions under 42 U.S.C. § 1983. These pre-1972 decisions demonstrated some doubt on the question of what quantum of involvement had to exist between an essentially private institution and the state before the essentially private institution became subject to the substantive requirements of 42 U.S.C. § 1983.

In 1972, this Court decided the case of Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed.2d 627 (1972). Moose Lodge, supra, presented the claim of a guest of a member of a private club who had been refused service because of his race. Relying on the fact that a liquor license had been issued to the lodge under the provisions of Pennsylvania law, plaintiff asserted that the lodge was subject to the restrictions imposed by the United

States Constitution against discriminatory "state action". This Court held that governmental contacts with an essentially private institution were insufficient to impose the constitutional restrictions against discriminatory "state action" where such contacts were not so pervasive as to make that institution lose its essentially private character. As this Court stated:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. ... ." (407 U.S. at pp. 176-177).

Following the Moose Lodge, supra, decision, claims of a very similar nature to those presented by petitioner here have been advanced in the various circuit courts. In particular, the United States Courts of Appeals for the Second, Fifth, Seventh,

Ninth and Tenth Circuits have been presented with similar claims. In each instance, these circuit courts have held that the receipt of such state aid as Hill-Burton funds, tax advantages or other incidental governmental contacts are not sufficient to clothe an essentially nonprofit hospital with "state action", given the absence of any connection or nexus between the governmental contacts and the alleged wrongs done to the plaintiffs there involved. Barrett v. United Hospital, 376 F. Supp. 791 (S.D. N.Y. 1974), aff'd. 506 F.2d 1395 (2d Cir. 1975); Greco v. Orange Memorial Hospital Corporation, supra; Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Ascherman v. Presbyterian Hosp. of Pac. Med. C., Inc., 507 F.2d 1103 (9th Cir. 1974); Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

As to the petitioner's assertion that there is a conflict between the decisions within the Courts of Appeals for the Sixth, Eighth and Tenth Circuits (Petition, pp. 9-10), a review of the decisions cited by petitioner in support of these claims demonstrates the abject lack of validity to these assertions.

As to the Eighth Circuit, petitioner cites the decision of Klinge v. Lutheran Charities Ass'n of St. Louis, 523 F.2d 56 (8th Cir. 1975). Petitioner asserts that the court "...did not question and appeared to acknowledge that where a defendant non-profit private hospital had participated substantially in the receipt of federal funds and had substantial contract relations with the state and city governments, it was subject to federal constitutional limitations. ... ." (Petition, p. 8).

The decision in Klinge, supra, provides no basis to support petitioner's

interpretation. In Klinge, supra, 523 F.2d at p. 60, the court made particular note of the fact that:

> "... . No claim is made that the action of the Hospital's Board of Directors in removing plaintiff from the staff was not state action which would give the court jurisdiction under 28 U.S.C. § 1343(3) read in connection with 42 U.S.C. § 1983."

Accordingly, the court did not consider the question and, therefore, no reasonable assertion can be made that there is any internal conflict between the decisions of the Eighth Circuit.

Petitioner's assertion that there is a split within the decisions of the Sixth Circuit is even more strained. Following the decision in Moose Lodge, supra, the Sixth Circuit rendered the decision in Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973), its most recent on the question. There, the

Sixth Circuit held that the receipt of Hill-Burton funds was not sufficient, in and of itself, to make the conduct of a private hospital "state action."

As to the Tenth Circuit, and any alleged conflict between the decisions of that court, petitioner cites a 1971 decision, Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir. 1971), and compares that decision to Ward v. St. Anthony Hospital, supra, (Petition p. 8). There is no conflict between these decisions. In Don, supra, the court was not required to focus on the question presented here, giving the matter only the most cursory treatment. However, in Ward, supra, the court squarely considered the issue and held that because there was no nexus between the governmental contacts alleged and the medical staff decisions of St.

Anthony Hospital, there was no "state action" as required by 42 U.S.C. § 1983.

These recent decisions in the Sixth, Eighth and Tenth Circuits which have followed pronouncements of Moose Lodge, supra, leave only one case among the circuit courts which reasonably can be said to support petitioner's contention that there is a conflict between the circuits on the question presented here. This case is Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974). That is, Duffield, supra, stands as the only decision in any of the circuit courts which has been rendered after Moose Lodge, supra, that would support the contention that the receipt of Hill-Burton funds or other such incidental governmental aid to an essentially private hospital is sufficient to clothe the institution's conduct with state action under 42 U.S.C. § 1983. The explanation for this disparity between

Duffield, supra, and the overwhelming number of decisions to the contrary may well be found in the fact that the small portion of Duffield, supra, which considered the instant question made no mention of this court's decisions on the matter or of the nexus requirement set forth in Moose Lodge, supra.

Further, the Duffield, supra, case was rendered before this Court denied a petition for certiorari raising the same issue as that presented here. Greco v. Orange Memorial Hospital Corporation, supra. No reasonable argument is presented by petitioner to buttress a claim that reasons now exist for granting certiorari which did not exist when this Court so recently considered and denied a petition raising the issue.

CONCLUSION

There is no serious conflict between the circuit courts on the question presented. Except for a single aberration the rule among the circuits is clear. They apply the principles of Moose Lodge, supra, and dismiss 42 U.S.C. § 1983 claims under circumstances such as those presented here. Given the fact that the split among the circuits is minimal and is moving toward resolution, there is no compelling need for this Court to grant petitioner's petition for a writ of certiorari.

Respectfully submitted,

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